

1 ANDREW J. OGILVIE 057932
2 CAROL M. BREWER 214035
3 ANDERSON, OGILVIE & BREWER, LLP
4 235 Montgomery St., Ste. 914
5 San Francisco, California 94104
6 Tel: 415/861-2265
7 Fax: 415/861-3151
8 andy@aoblawyers.com
9 carol@aoblawyers.com

10 MICHAEL E. LINDSEY 99044
11 Attorney at Law
12 4455 Morena Blvd., Suite 207
13 San Diego, California 92117-4325
14 Tel: 858/270-7000
15 Fax: 858/270-7710
16 mlindsey@lemonlawcenter.com

17 Attorneys for Plaintiff
18 Jose Aguayo, and for the class

19 UNITED STATES DISTRICT COURT
20 SOUTHERN DISTRICT OF CALIFORNIA

21 JOSE AGUAYO, an individual,

22 Plaintiff,

23 v.

24 US BANK, a business entity form
25 unknown, and DOES 1-30, inclusive,

26 Defendants.

27 Case No. 08-CV-02139 W (BLM)

28 **MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

Honorable Thomas J. Whelan
January 24, 2017

NO ORAL ARGUMENT PER
LOCAL RULE

29 Plaintiff, Jose Luis Aguayo, through his counsel, individually and on behalf of
30 the certified class, requests this Court to enter an order preliminarily approving the
31 proposed class action settlement. This litigation has been lengthy, consuming more
32 than eight years. It has also been extremely hard-fought. The case was dismissed
33

1 early on and the Ninth Circuit reversed. The parties had completed discovery. The
2 Court had certified the class and ruled on the merits. The parties were on the verge of
3 trial to determine the only remaining issue—the appropriate measure of profits to be
4 returned to the class as restitution—when they reached the proposed settlement.
5 Plaintiff submits that the proposed settlement is an excellent result for the certified
6 class, and should be preliminarily approved.

Summary of the Proceedings

8 Plaintiff filed a class action complaint against U.S. Bank in the San Diego
9 County Superior Court in July 2008. U.S. Bank removed the case to this Court
10 pursuant to the Class Action Fairness Act. Plaintiff asserted claims for violation of
11 California's Unfair Competition Law, Cal. Bus & Prof Code §§ 17200 *et seq.*, and
12 asked for restitution and injunctive and declaratory relief, in connection with alleged
13 violations of the Rees-Levering Automobile Sales Finance Act, Cal. Civ. Code §§
14 2981 *et seq.*

15 This Court initially dismissed Plaintiff’s claims, finding that the National
16 Bank Act and regulations promulgated thereunder preempted the application of
17 California law to Plaintiff’s claims. Plaintiff appealed to the Ninth Circuit, which
18 reversed, *Aguayo v. U.S. Bank*, 653 F.3d 912 (9th Cir. 2011). U.S. Bank petitioned
19 for rehearing and rehearing *en banc*, which the Ninth Circuit denied. Then U.S. Bank
20 petitioned the U.S. Supreme Court for certiorari, which was also denied.

In October 2012 the Ninth Circuit issued the Mandate returning the Action to this Court. U.S. Bank again moved for dismissal of Plaintiff's claims based on federal preemption in November 2012. The Court denied that motion in September 2013, and, after briefing, also denied U.S. Bank's motion to reconsider. The parties undertook substantial investigation and formal discovery, including reviewing thousands of pages of documents, depositions on both sides, and retaining experts on both sides. The parties attempted a full-day mediation with the Hon. Judge James

1 Warren (Ret.) of JAMS in April 2014, which proved unsuccessful. The parties also
2 attended a mandatory settlement conference with U.S. Magistrate Judge Barbara
3 Major in November 2014, which was unsuccessful. U.S. Bank moved for summary
4 judgment in June 2014, which the Court denied.

5 Plaintiff moved for class certification in May 2014. After extensive briefing
6 and vigorous opposition by U.S. Bank, in January 2015 the Court certified a class
7 defined as follows:

8 All California consumer residents (who purchased a motor vehicle for use
9 primarily for personal or household purposes and whose loan documentation
10 does not include an arbitration clause) to whom U.S. Bank sent post-
11 repossession notices of intent to dispose (NOIs) between August 1, 2004 and
12 April 22, 2014, whose vehicles were sold or otherwise disposed of after
13 repossession or voluntary surrender, who U.S. Bank asserts are liable to it for
14 a deficiency balance, against whom U.S. Bank has not obtained a judgment,
15 and who have not had U.S. Bank's deficiency claim discharged in bankruptcy.

16 After briefing, the Court denied U.S. Bank's motion for reconsideration. U.S.
17 Bank petitioned the Ninth Circuit for permissive review of the class certification
18 order pursuant to Fed.R.Civ.P. 23(f), which Plaintiff opposed. After the Ninth Circuit
19 denied review, Plaintiff gave class members Class Notice by first-class mail and the
20 opportunity to opt out. Notice was completed in December 2015. Three persons
21 opted out.

22 To comply with deadlines in the pre-trial order, Plaintiff moved for partial
23 summary judgment as to U.S. Bank's liability in December 2014. Due to the rule
24 against one-way intervention, however, Plaintiff asked the Court to delay ruling until
25 after the Class was certified and notified. In May 2016, after requesting additional
26 briefing from both parties, the Court granted Plaintiff's summary judgment motion,
27 ruling that U.S. Bank's notices of intent to dispose of repossessed vehicles (NOIs)
28 did not comply with Civil Code § 2983.2(a)(2). Consequently, the Court determined
that U.S. Bank's practices of collecting and attempting to collect Deficiency Balance

1 Payments from Class Members was unlawful. The Court entered declaratory
 2 judgment, stating that U.S. Bank's deficiency claims against Class Members were
 3 invalid, void and unenforceable and that Class Members are not liable to U.S. Bank
 4 for the Deficiency Balances. Additionally, the Court entered an injunction against
 5 U.S. Bank, prohibiting it from collecting any further Deficiency Balances from Class
 6 Members.

7 At the point of the proposed settlement, the only issue remaining to be
 8 determined at trial was the appropriate measure of restitution to be returned to the
 9 Class, including whether the Class was entitled to recover interest or profits on their
 10 Deficiency Balance Payments. The Court ordered briefing on that issue. In August
 11 2016, the Court ruled that under California law, Plaintiff and Class Members were
 12 entitled to the profits that U.S. Bank earned from their Deficiency Balance Payments,
 13 to the extent that Plaintiff could produce, at trial, evidence permitting a reasonable
 14 approximation of the amount of the wrongful gain.

15 Following that ruling, in October 2016 the Parties participated in a second
 16 settlement conference with Judge Major. At the conclusion of the settlement
 17 conference the parties reached an agreement as to material terms of a settlement,
 18 subject to approval of the Court, among other things.

19 **The Proposed Settlement**

20 Rule 23(e) requires the Court to determine whether a proposed settlement is
 21 "fundamentally fair, adequate, and reasonable." *Staton v. Boeing Co.*, 327 F.3d 938,
 22 959 (9th Cir.2003) (quoting *Hanlon*, 150 F.3d at 1026). To make this determination,
 23 the Court must consider a number of factors, including: (1) the strength of Plaintiff's
 24 case; (2) "the risk, expense, complexity, and likely duration of further litigation;" (3)
 25 "the risk of maintaining class action status throughout the trial;" (4) the amount
 26 offered in settlement; (5) the extent of discovery completed, and the stage of the
 27 proceedings; (6) the experience and views of counsel; (7) the presence of a

1 governmental participant; and (8) the reaction of the class members to the proposed
 2 settlement. See *id.* (citations omitted). In addition, the settlement may not be the
 3 product of collusion among the negotiating parties. *In re Mego Fin. Corp. Sec. Litig.*,
 4 213 F.3d 454, 458 (9th Cir.2000) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d
 5 1268, 1290 (9th Cir.1992)). Courts must give "proper deference to the private
 6 consensual decision of the parties," since "the court's intrusion upon what is
 7 otherwise a private consensual agreement negotiated between the parties to a lawsuit
 8 must be limited to the extent necessary to reach a reasoned judgment that the
 9 agreement is not the product of fraud or overreaching by, or collusion between, the
 10 negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and
 11 adequate to all concerned." *Hanlon*, 150 F.3d at 1011.

12 The Court will not be able to fully assess some of these factors until the Final
 13 Approval Hearing, so "a full fairness analysis is unnecessary at [the preliminary
 14 approval] stage." See *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D.Cal.2008).
 15 Rather, at the preliminary approval stage, the Court need only review the parties'
 16 proposed settlement to determine whether it is within the permissible "range of
 17 possible judicial approval" and thus, whether the notice to the class and the
 18 scheduling of the formal fairness hearing is appropriate. See 4 William B.
 19 Rubenstein et al., *Newberg on Class Actions* § 11:25 (4th ed.2002) (citations
 20 omitted); see also *Wright v. Linkus Enterprises, Inc.*, 259 F.R.D. 468, 472 (E.D.Cal.
 21 2009) (citation omitted); *Alberto*, 252 F.R.D. at 666 (citation omitted). Preliminary
 22 approval of a settlement and notice to the proposed class is appropriate: "[i]f (1) the
 23 proposed settlement appears to be the product of serious, informed, noncollusive
 24 negotiations, (2) has no obvious deficiencies, (3) does not improperly grant
 25 preferential treatment to class representatives or segments of the class, and (4) falls
 26 with the range of possible approval." *Vasquez v. Coast Valley Roofing, Inc.*, 2009
 27 WL 3857428, at *7 (E.D.Cal. 2009) (citing *In re Tableware Antitrust Litig.*, 484
 28

1 F.Supp.2d 1078, 1079 (N.D.Cal.2007)).

2 The proposed Settlement Agreement is attached hereto as **Exhibit 1**. The
3 proposed settlement is clearly an excellent result for the certified class. The parties
4 submit it is “within the range of possible approval.” The parties had already litigated
5 the merits and class certification. The Court certified the Class in January 2015, so
6 settlement approval involves only a certified class, not a settlement class. The parties
7 engaged in three separate arm’s length settlement negotiations over a period of years,
8 concluding with a successful half-day settlement conference with Magistrate Judge
9 Barbara Major in October 2016. Then they negotiated the aspects of the proposed
10 settlement over several more weeks before the preliminary settlement documents
11 were agreed upon. Brewer Dec., ¶ 3. The proposed settlement is the product of
12 serious, informed, noncollusive negotiations. It does not improperly grant
13 preferential treatment to the Plaintiff or any segments of the class.

14 U.S. Banks says that Class Members paid a total of \$2,334,139 in Deficiency
15 Balance Payments to U.S. Bank. The proposed settlement provides that U.S. Bank
16 will establish a \$4,415,000 fund—nearly twice the total of Class Members’
17 payments—to be administered by the Settlement Administrator. The Settlement
18 Administrator will distribute that fund to Refund Eligible Class Members in
19 accordance with the Plan of Distribution. Those Class Members will receive cash
20 refunds of at least 100% of their Deficiency Balance Payments; those who made
21 deficiency payments early in the class period will recover more than people who paid
22 the same amount later in the class period. Class Members need not make a claim or
23 fill out any claim forms to receive these cash payments.

24 The majority of Class Members did not make any Deficiency Balance
25 Payments, so they will not receive any cash payments. However, *all* Class Members
26 will receive important non-monetary relief. Although the Court had already ruled
27 that U.S. Bank’s deficiency claims against plaintiff and the class members were

1 invalid, void, and unenforceable, and therefore they were not liable for those
2 deficiency balances [See ECF 187 at 15:3-5], the Court declined to order U.S. Bank
3 to remove those alleged obligations from its records. The proposed settlement
4 provides that U.S. Bank will reduce to \$0 the Deficiency Balances on every Class
5 Member's account, clearly a benefit to all Class Members. U.S. Bank will also
6 submit requests electronically to the Consumer Reporting Agencies to which it
7 reports, asking them to delete the entire U.S. Bank tradeline on Class Members'
8 credit reports. And it will identify Class Members to whom it has previously issued
9 an IRS Form 1099-C with regard to the reduction to \$0 of a Deficiency Balance and
10 issue corrective Form 1099s.

11 **Settlement Notice**

12 Plaintiff has already notified members of the Certified Class by first-class mail
13 and the opt-out period has expired. Three persons have excluded themselves from the
14 Class. Brewer Dec., ¶ 2. Thus, the Settlement Notice gives Class Members the
15 opportunity to object to the proposed Settlement, but not to exclude themselves. The
16 settlement notice must be "reasonably calculated, under all the circumstances, to...
17 afford [interested parties] an opportunity to present their objections." See *Mullane v.*
18 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

19 The proposed Settlement Notice, attached to the Settlement Agreement as
20 **Exhibit B**, provides: (1) information on the nature of the case and the definition of
21 the Certified Class; (2) the terms and provisions of the proposed settlement; (3) the
22 relief Certified Class Members will be entitled to, including the statement that each
23 Refund Eligible Class Member will be paid at least 100% of their Deficiency
24 Balance Payments; (4) information regarding attorneys' fees and expenses, and
25 Plaintiff's proposed service award; (5) the procedures and deadlines for submitting
26 objections; and (6) the date, time, and place of the Final Approval Hearing.

Mailed Notice is the Best Notice Practicable

U.S. Bank will provide an updated electronic database, with Class Members' names, addresses and dates and amounts of their Deficiency Balance Payments, to a professional Settlement Administrator, Rust Consulting, Inc. (Rust). Rust has already given Class Notice in this action. Rust will update Class Members' addresses through a national change of address search and mail the Settlement Notice by first-class mail. That is the best notice practicable.

U.S. Bank shall bear the reasonable costs of providing Settlement Notice to the Certified Class and other class settlement costs, including reducing to \$0 the Deficiency Balances on each Class Member's account, identifying any Class Members to whom it has previously issued an IRS Form 1099-C with regard to the elimination of a Deficiency Balance and issuing corrective Form 1099s, and making the distributions required under the Settlement Agreement.

CONCLUSION

For the foregoing reasons, Plaintiff, Jose Luis Aguayo, individually and on behalf of the certified class, respectfully requests this Court to preliminarily approve the class action settlement, subject to a hearing on the final approval of this settlement.

Dated: December 16, 2015

Anderson, Ogilvie & Brewer LLP

By: s/ Carol McLean Brewer
Carol McLean Brewer
Attorneys for Plaintiff Jose Aguayo
and the Class